Attachment 1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAL-FRUIT SUMA INTERNATIONAL, ET AL.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 87-1503
UNITED STATES DEPARTMENT OF AGRICULTURE,	)	
Defendant.	)	

DECLARATION

James M. Scanlon, being duly sworn, deposes and states:

1. I am the Acting Chief of the Marketing Order Administration Branch (MOAB), Fruit and Vegetable Division, Agricultural Marketing Service (AMS), United States Department of Agriculture. In that capacity, I am assigned the responsibility for the administration of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.; hereinafter the "Act"), with respect to, among other things, Marketing Order No. 925 - Grapes Grown in a Designated Area of Southeastern California.

2. The statements in this declaration are based upon the knowledge and information I have as Acting Chief of the MOAB and upon official records of the MOAB, Fruit and Vegetable Division, AMS.

in accordance with the Procedure for Requesting Inspection and designating the Agencies to Perform Requested Inspection and Certification (7 C.F.R. 944.400).

32. Import regulations for certain fruits appear in Part 944 of the regulations (7 C.F.R. Part 944). Section 944.400 establishes the designated inspection services and procedure for obtaining inspection and certification of imported fruits, including table grapes, regulated under section 8e of the Agricultural Marketing Agreement Act of 1937. In addition to specifying the content of an inspection certificate, inspections are to be performed and certificates issued in accordance with the provisions of Part 51 of the regulations for Fresh Fruits, Vegetables and Other Products (Inspection, Certificates and Standards) (7 C.F.R. Part 51).

33. Part 51 of the regulations was promulgated pursuant to the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 et seq.). That Act authorizes the Department to inspect certain specified agricultural commodities, including grapes. Under that Act, such inspections are voluntary for both domestic and imported agricultural commodities. The consistent interpretation of the 1946 Act by the Department has been that the Secretary is not authorized to conduct inspections outside the United States. Accordingly, both domestic and imported table grapes may be voluntarily inspected at all times of the year.

Attachment 2

United States Department of Agriculture
Agricultural Marketing Service
Washington, D.C. 20250

JUN 23 1987

Ms. Kimberly A. Hincken
953 Rustling Oaks Drive
Millersville, Maryland 21108

Dear Ms. Hincken:

This is in response to your June 1 letters to Charles Brader and myself regarding USDA inspection of agricultural products in foreign countries.

Inspections of fresh fruits and vegetables are presently performed under authority of the Agricultural Marketing Act of 1946. The thrust of this statue is to assist American agriculture, and while inspection of imported produce is performed at U.S. destination markets and border points, we have no authority to perform these functions in foreign production areas.

As you are aware as a result of inquiries you have made on behalf of Akin, Gump, Strauss, Hauer & Feld, personnel in the various States are licensed by USDA to perform inspections under provisions of cooperative agreements with State entities. For the sake of convenience, USDA licensed personnel from the States of Arizona and Texas regularly inspect and grade Mexican produce at compounds in Mexico directly across from U.S. ports of entry. This allows for a determination to be made immediately prior to clearing both Mexican and U.S. customs. I am aware of no other similar situation.

Sincerely,

Karl E. Torline

Karl E. Torline, Chief
Fresh Products Branch
Fruit and Vegetable Division

United States Department of Agriculture

Office of General Counsel

Washington, D.C. 20250

Attachment 3

26 NOV 1982

TO: Charles R. Brader, Director
Fruit & Vegetable Division, AMS
Marketing Division

FROM: John C. Chernauskas
Assistant General Counsel
Marketing Division

SUBJECT: Is there authority in the AMA of '46 to conduct foreign inspections

This memorandum responds to the question: does the Agricultural Marketing Act of 1946, 7 U.S.C. 1621-1627, authorize the Secretary of Agriculture to conduct inspections of foreign agricultural products outside the United States. We believe, with one possible and narrow exception, the answer is no.

Section 203(h) of the statute authorizes the Secretary:

> "[t]o inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce . . ."

The issue then is who did Congress intend to protect and benefit by this provision and were foreign agricultural products meant to be covered. 1/

Although "agricultural products" is defined in §207 without reference to location, several other sections of the Act refer to "American agricultural products", e.g. §§202(3) and 203(a). Section 202 states that the Act is intended, among other things, to permit the profitable and economical distribution of the full production of "American farms" and to develop "new and wider markets for American agricultural products". The thrust of the entire statute is to assist American farmers. The Senate report which accompanied the original legislation notes that agricultural products must be successfully marketed for the "Nation" to prosper. S. Rept. No. 1843 (July 26, 1946) printed at p. 1584 U.S. Code Cong. and Admin. News (1946).

Section 205 of the Act authorizes the Secretary to cooperate with a wide variety of private and governmental agencies, but not with foreign entities.

1/ There does not appear to be any case law on point, however, in discussing a tort claim against an agricultural inspector, a New York Federal District Court stated that the Congressional purpose of Section 203(h) was to provide uniform grading of fruits and vegetables on a nationwide basis. Haynes v. United States, 327 F. Supp. 264 (W.D.N.Y. 1970).

Section 203(g) directs the Secretary to disseminate marketing information for the purpose of maintaining "farm income and bringing about a balance between production and utilization of agricultural products." This certainly contemplates American farm income and American production. Moreover, here and elsewhere where consumption is discussed it is in the context of effective utilization of production. 2/

This is important to note because of the doctrine of implied authority. That is, even where there is no explicit authority in a statute to do something-for instance to conduct inspections outside the country-it has been held that there is implied authority to do that which is reasonably necessary and incidental to carry out the purpose of the statute. 3/ As has been demonstrated, the Act is intended to serve the interests of American farmers, so to be authorized, foreign inspections would have to be shown to be necessary to that goal.

Inspection of fish and shellfish under section 203(h) is conducted by the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. Although they have not conducted any foreign inspections, their attorneys have apparently advised them that they would be authorized to inspect, in Canada, certain fish intended for eventual processing by American processors. This may therefore fall within the exception outlined above.

We have also examined the Trade Agreements Act of 1979 to determine if it has any impact on this question. It does not. Title IV of the Act (19 U.S.C. 2531 et seq.) requires that a Federal agency not discriminate in applying standards-related activities with respect to imported products. Providing for domestic inspection of an imported product would meet this requirement.

2/ (a) A purpose of the Act is to narrow "the price spread between the producer and consumer" (§§202, 203(b)).
(b) The Secretary is directed to conduct consumer education to achieve "greater consumption of agricultural products" (§203(f)).

3/ See United States v. Sischo, 262 U.S. 165 (1923); Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177. Concerning the parallel authority to spend appropriated funds for expenses necessary and incidental to the purpose of the appropriation, notwithstanding 31 U.S.C. 628 restricting the use of appropriated funds, see 6 Comp. Gen. 621 (1927); 17 Comp. Gen. 636 (1938); 29 Comp. Gen 421 (1950); 53 Comp. Gen. 351 (1973).

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250

JUN 10 1971

SUBJECT: Request for opinion on Rendering Inspection Service on Foreign Dairy Plants Under Agricultural Marketing Act of 1946

TO: George R. Grange
Deputy Administrator Marketing Services
Consumer and Marketing Service

This refers to your memorandum of December 12, 1969, requesting our opinion on the authority of C&MS to grade and inspect foreign dairy products and approve the foreign plants in which they originate at the request and expense of the applicants for such services. This matter was informally discussed with you subsequently, but no written reply was made. You have recently indicated that you would like a written reply.

You mention that importers of casein, a dry milk product made from skim milk, have asked C&MS for inspection and approval of certain foreign plants that produce the casein. The reasons for this request are said to be as follows:

1. USDA Meat Inspection regulations at 9 C.F.R. 318.6 provide that dry milk products which are intended for use as ingredients of meat food products shall be considered acceptable for such use only when produced in a plant approved by the Department under regulations in 7 C.F.R. Part 58.

2. The regulations of the Dairy Division at 7 C.F.R. 58.122 provide that ". . .Only dairy products manufactured, processed and packaged in an approved plant may be graded or inspected. . ." Importers wish to have foreign dairy plants approved and imported casein graded in accordance with official United States standards in order that the imported casein will meet the requirements for use as an ingredient in meat food products.

3. Processors and farmers in the United States complain that imported dairy products have an unfair competitive advantage in the United States market since they are only subject to end product inspection (cursory spot examination and testing) whereas domestic dairy production, from the processing plant to the milk used and finished product, is required to meet both State and Federal standards of sanitation. Also, since imported dairy products are subject to end product inspection only, consumers of these products do not receive the same degree of protection as they do on domestic products which have originated in approved plants and are graded by the Department.

Section 207 of the Agricultural Marketing Act of 1946 (7 U.S.C. 1626) defines agricultural products as including dairy products. Domestic dairy plants are inspected and approved by the Department and their products officially graded under authority of Sec. 203(h) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1622(h)), which reads in part as follows:

"The Secretary of Agriculture is directed and authorized:

* * * * *

"(h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection."

Section 202 (7 U.S.C. 1621) sets forth the Congressional declaration of purpose with respect to the Act. It makes clear that the purpose of the Act is to improve the distributing and marketing system so that "new and wider

markets for American agricultural products may be developed." Various subsections of Section 203 also make this clear. See, for example, Section 203(a).

The legislative history of the Agricultural Marketing Act of 1946 likewise reveals that it was expressly designed to assist American agricultural producers by promoting research into the problems of marketing and distribution of American agricultural products. H.R. Rep. No. 2458, 79th Cong., 2d Sess. 3, 4 (1946). There is no intent expressed to extend the programs authorized by the Act to foreign agricultural producers.

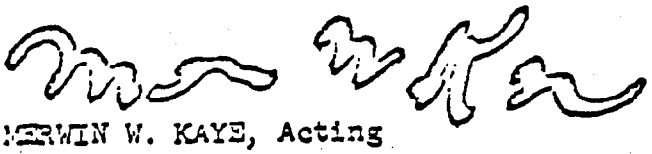
Furthermore, in Section 203(h) Congress authorized the Department only to inspect and grade "agricultural products when shipped or received in interstate commerce." The statute does not define "interstate commerce." However, the Federal courts have had occasion to consider the meaning of the term "interstate commerce" as used in other statutes. In Border Pipe Line Co. v. Federal Power Commission, 171 F. 2d 149 (D.C. Cir. 1948), the court considered the question as to whether the export of natural gas from the United States to Mexico is in interstate commerce within the meaning of the Natural Gas Act. The court held as follows:

> "Interstate commerce and foreign commerce have been distinct ideas ever since they appeared as two concepts in the Constitution. The clause there provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". "Interstate commerce" does not include foreign commerce, unless Congress by definition for the purposes of a particular statute includes them both in the single expression. Congress has frequently done that. It has also many times applied its enactments to "interstate and foreign commerce" and is perfectly familiar with that expression and that idea.
>
> * * * * *
>
> "Questions such as the one presented in this case are properly for the Congress. The circumstances upon which they arise are familiar. Congress uses expressions of established meaning. It takes action of recognized implications; e.g.,

it strikes from a pending bill a clause of clear import. But the administrative body finds a sufficient penumbra of meaning to justify a claim to more authority than appears upon the face of its grant. It asserts the extended authority and thus forces the issue upon the courts. It asks the courts to divine an intent on the part of Congress and then to decree that the words of the statute spell that intent. Of course, if there be a plain intent, or purpose, or objective, the statute must be deemed to be in pursuit of it, and the courts will enforce that view. But where relatively plain language and congressional conduct of accepted implication point one way and the contrary appears only through strained and complex assumptions and deductions, questions which the administrators may have as to the full intent and desirable scope of the congressional action ought to be addressed to the Congress. The prime responsibility for making statutory meaning clear is on the Congress. It is bad from the viewpoint of sound government for the courts to twist strange results out of otherwise understood expressions of the legislature. If, perchance, the judiciary does not reach the objective at which the legislature aimed, there is a most undesirable confusion of functions of the two branches. Such practice by the judiciary is also bad from the viewpoint of the law generally. Words of established meaning are given an unnatural significance, and thereafter whenever they appear the law is uncertain. The interpretation of statues is not like the interpretation of a will, where the person whose intent is to be ascertained no longer lives and some meaning must be given his expressions however meaningless; or of a contract as to which the sole parties differ in their assertions of intent or meaning. In those situations an interpretation is the only available procedure and, once had, is irretrievable. Not so in the case of a statute; the Congress is in frequent session, its doors open and its committees available. Its procedure is no more complicated than that of the courts. If an administrative agency thinks that the real intent and purpose of a statute

> is broader than or different from its terms, it need only ask Congress for an enlargement or clarification. We are no longer in an age when such inquiry is impractical. The wise and sound course for the courts is to give the terms of a statute their plain meaning, so long as the resultant effect is sensible and not in conflict with a discernible purpose."

It is our conclusion that the Department has no authority to send its representatives abroad under the Agricultural Marketing Act of 1946 to inspect and approve foreign dairy plants so that their products would then be eligible for official grading in the United States. We also know of no other law under which this could be done.



MERWIN W. KAYE, Acting
Assistant General Counsel

Attachment 5

February 19, 1982

TO: F/UD2 - Tom Billy

FROM: GCF - Jay S. Johnson [S]

SUBJECT Grading Foreign Processed Seafood Products

Issue: May the Seafood Inspection Service, National Marine Fisheries Service, "grade and mark" foreign processed seafood products?

Conclusion: The Seafood Inspection Service, National Marine Fisheries Service, is not prohibited by either the Agricultural Marketing Act of 1946 or the Fish and Wildlife Act of 1956 from grading foreign processed seafood products. Prior to performing this service, however, the Agency must, as a matter of policy, determine that the inspection of foreign processed product will further the purposes of both the Fish and Wildlife Act of 1956 and the Agricultural Marketing Act of 1946.

Discussion:

The National Marine Fisheries Service (NMFS) Seafood Inspection program is authorized by the Agricultural Marketing Act (7 U.S.C. 1622 et seq.) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.). Congress, in the Fish and Wildlife Act, declared that the United States government should promote the development of the domestic seafood industry. Therefore, it is possible to grade and mark foreign processed seafood product, only if doing so will aid the domestic seafood industry.

Grading and marking foreign processed seafood product, however, may give imported products an advantage over U.S. produced or processed products in the U.S. market place. By grading foreign processed product, the Department of Commerce may make foreign processed seafood more competitive with American processed product and thereby violate the intent of the Fish and Wildlife Act. This would be especially true if the foreign country in which the product is processed subsidizes the harvesting or processing of that product, since the Act mandates that the programs administered under its provisions protect the American industry from subsidized competing products.

Because the Fish and Wildlife Act does not promote any

one segment of the domestic seafood industry to the detriment of the others, the interests of the various sectors of the fishing industry must be balanced against each other before arriving at a policy decision that inspecting foreign processed product would promote the interests of the domestic seafood industry.

The Agricultural Marketing Act (7 U.S.C. 1622 et seq., "AMA") provides for the inspection and certification of agricultural products (including fish and shellfish) that are shipped or received in interstate commerce. This statute allows the Secretary of Commerce:

> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary [of Commerce] may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire.

Under the provisions of the AMA, as long as the product is shipped or received in interstate commerce it may be inspected, certified and graded.

By regulation, a seafood product must be inspected by either a Department of Commerce employee or someone licensed by the Department of Commerce to perform seafood inspection. A person licensed by the Department of Commerce to sample or inspect a product may be either a Federal employee or an employee of a State of the United States whose agency is working with the Department in its inspection activities. 50 CFR 260.49. The inspection service may be furnished wherever an inspector or licensed sampler is available. 50 CFR 260.12. Although, there is no present regulatory authority to license a foreign government employee to perform inspection services or contract with a foreign government to have joint inspection services in a foreign country, there is no prohibition against a Department of Commerce inspector inspecting product in a foreign plant. After a Department inspector inspects foreign processed product, the product can be graded and receive a grade mark.

Neither the Fish and Wildlife Act of 1956, the Agricultural Marketing Act of 1946, nor the existing program regulations prohibit the grading of foreign processed seafood product. Prior to performing this service, however the agency must, as a matter of policy, determine that the inspection of foreign processed product will further the purposes of both the Fish and Wildlife Act of 1956 and the Agricultural Marketing Act of 1946.

Attachment 6

United States Department of Agriculture

Agricultural Marketing Service

Washington, D.C. 20250

JUN 24 1987

In reply, please refer to AMS (#58-87)

Ms. Kimberly A. Hincken
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, NW
Suite 400
Washington, D.C. 20036

Re: Freedom of Information Act (FOIA) Request for Documents Relating to USDA Grading Abroad (#58-87)

Dear Ms. Hincken:

This is in reply to your Freedom of Information Act request of June 15, 1987, which was received in this office June 17, 1987.

The documents you request are extremely voluminous. There are approximately 51,500 inspections conducted annually in Mexico at points adjacent to the U.S. border. Records on these inspections are maintained for five years. Each inspection file would entail at least three documents—certificate, notesheet, and either a preliminary report or a shipment release. Therefore, a rough estimate of copying costs alone would be $77,500.

You may wish to limit your request in order to limit the expense. If you wish to do so please specify to us, in writing, what documents you specifically request. If you wish to receive all of the documents covered by your request as written, we will process your request. We wish to inform you that the documents are maintained in several locations in the South and Southwest.

In view of the costs involved, we will not actually compile and begin copying the documents until you indicate that you wish to receive all of the documents responsive to your request and that you will pay the costs of search and duplication.

We look forward to hearing from you.

Sincerely,

Clarence Steinberg
Freedom of Information Officer
Agricultural Marketing Service